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EASEMENTS

(This chapter taken from Jim Phillips, *Property Law: 2008-2009*)

A) INTRODUCTION

An easement is one of the class of rights in land known as "incorporeal hereditaments", or sometimes as "servitudes". It is essentially the right of one landowner to go onto the land of another and make some limited use of it. It is not a "natural right", it does not come with the fee simple, and must therefore be created as part of the relationship between the two landowners. There are many types of easements, in the sense that there are many different kinds of things which can be the subject of an easement. There is also more than one way to create an easement. Perhaps the most common kind of easement is the right of way created by express agreement of the parties, and I will use that paradigmatic situation as an illustration

Imagine that A owns land bordered on three sides by woods, and on one side by a road. A wishes to sell part of the land, and B wishes to buy part of it. But A wants to sell a part that does not border on the road. B is not going to buy if getting to the grocery store entails, at best, hacking a path through the woods - assuming that B has a right to go through the woods. If not, a helicopter will be required. The solution is simple - as part of the agreement by which she buys the land from A, B also obtains the right to cross A's land to get to the road. Presumably A will extract some price for this, some increase in B's purchase price, but it matters not to the law whether payment is given, only that the agreement has been made.

Easements are a relationship between two parcels of land - the dominant tenement and the servient tenement. In this example the land that is reached by crossing the other parcel is the dominant tenement; the land that is crossed is the servient tenement, it serves the dominant tenement.

If an easement has been created by one of the methods acceptable to the law (an issue dealt with in sections (c) and (d) of this chapter), and if the right granted meets the necessary test as being the kind of thing allowed by the law of easements (an issue discussed immediately below in section (b)), then it will generally run with the land, be a part of title. That is, if the easement is created during the period that A and B own the two pieces of land, and A then sells to C and B sells to D, C and D are in the same position as landowners as A and B were. This is what makes the easement a property right, for the original agreement between A and B could be enforced merely as a contract, as could any other agreement between them. But if the particular right created by the initial contract is an easement, it becomes part of the title, part of the fee simple that each successor owner has, it has an existence independent of the identity of the owner of the land at any given time.

B) CHARACTERISTICS OF EASEMENTS

The first issue we will look at is that of what kinds of rights the law will consider to constitute valid easements. The common law will not simply consider any agreement between two landowners to have created an easement. To qualify, the right granted must meet the four-fold test laid out in *Ellenborough Park* below. In that case there was no question that an agreement was made between vendors and purchasers in 1855; but only if that agreement created a right in the nature of an easement can it still be enforced 100 years later. The four principal requirements are laid out below, and you should make sure that you understand what each means and how the court assesses them in light of the facts of the case.

IN RE ELLENBOROUGH PARK, [1956] 1 Ch. 131 (C.A.)

In 1855, Ellenborough Park at Weston-super-Mare and the surrounding property, being freehold land then open and unbuilt-on, belonged to two tenants in common who sold, for building purposes, the plots surrounding the park. The conveyances of the plots were in similar form granting to each purchaser "the full enjoyment at all times hereafter in common with the other persons to whom such easements may be granted of the pleasure ground [Ellenborough Park] ... but subject to the payment of a fair and just proportion of the costs charges and expenses of keeping in good order and condition the said pleasure ground." Each purchaser covenanted to pay a fair proportion of the expenses of making the pleasure ground and at all times keeping it in good order and condition and well stocked with plants and shrubs. The vendors covenanted with each purchaser, his heirs, executors, administrators and assigns, at the expense of the purchaser, his heirs, executors, administrators or assigns and all others to whom the right of enjoyment of the pleasure ground might be granted to keep Ellenborough Park as an ornamental pleasure ground. Danckwerts J. held that the right to use the pleasure ground was a right known to the law and an easement, and that accordingly the purchasers of plots and their successors in title had legal and effective easements so to use Ellenborough Park.

EVERSHED M.R. The substantial question raised in this appeal is whether the respondent, or those whom he has been appointed to represent, being the owners of certain houses fronting upon, or, in some few cases, adjacent to, the garden or park known as Ellenborough Park in Weston-super-Mare, have any right known to the law, and now enforceable by them against the owners of the park, to the use and enjoyment of the park to the extent and in the manner later more precisely defined. Both the premises now belonging to the respondent, or to the owners for whom he acts as champion, and also the park itself, were originally part of an estate known as the White Cross Estate. The houses in question were built and the park laid out in the middle of the last century. None of the owners of the houses is an original grantee from the proprietors of the White Cross Estate. Similarly, the present owners of the park are the successors in title of the original grantors of the premises of the house owners....

The substantial question in the case, which we have briefly indicated, is one of considerable interest and

be one analogous to that of a right of way which precedes it and a right of watercourse which follows it, and must be a right of utility and benefit and not one of mere recreation and amusement."

The words which we have quoted were used in reference to a claim for a right to conduct horse races and, in our judgment, the formula adopted by Theobald should be read in the light of that circumstance. In any case, if the proposition be well founded, we do not think that the right to use a garden of the character with which we are concerned in this case can be called one of mere recreation and amusement, as those words were used by Martin B. No doubt a garden is a pleasure - on high authority, it is the purest of pleasures - but, in our judgment, it is not a right having no quality either of utility or benefit as those words should be understood. The right here in suit is, for reasons already given, one appurtenant to the surrounding houses as such, and constitutes a beneficial attribute of residence in a house as ordinarily understood. Its use for the purposes, not only of exercise and rest but also for such domestic purposes as were suggested in argument - for example, for taking out small children in perambulators or otherwise - is not fairly to be described as one of mere recreation or amusement, and is clearly beneficial to the premises to which it is attached. If Baron Martin's test is applied, the right in suit is, in point of utility, fairly analogous to a right of way passing over fields to, say, the railway station, which would be none the less a good right, even though it provided a longer route to the objective. We think, therefore, that the statement of Baron Martin must at least be confined to exclusion of rights to indulge in such recreations as were in question in the case before him, horse racing or perhaps playing games, and has no application to the facts of the present case.

For the reasons which we have stated, Danckwerts J. came, in our judgment, to a right conclusion in this case and, accordingly, the appeal must be dismissed.

NOTES

1) *Re Lonegren et al and Rueben et al* (1988), 50 D.L.R. (4th) 431 (B.C.C.A.) concerned the requirement that the dominant and servient tenement be owned by different persons. At the time of the creation of the easement one tenement was owned by Mr and Mrs Reuben as joint tenants, the other by Mr Reuben and another person as tenants in common. Successors-in-title to the servient tenement argued, unsuccessfully, that this was tantamount to there not being different owners of the two tenements. The trial judge had held that ownership was sufficiently separate, and the Court of Appeal agreed, although without reasons.

2) In *Ellenborough Park* the court asks whether the easement is "inconsistent with the proprietorship or possession of the alleged servient owners". What policy considerations inform this part of the test for an easement?

3) A owns a piece of waste ground, and agrees to sell half to Wal-Mart. Wal-Mart intends to use the land for a new store, and makes an agreement with A for the use of A's retained part of the waste ground as a parking lot. Over the next couple of years about 100 cars a day are parked on A's land, the parked cars using about half of the area. A then sells to C, who tells

Wal-Mart it cannot use the parking lot any longer. Wal-Mart claims it has an easement for parking. What arguments would you use on C's behalf?

POSITIVE AND NEGATIVE EASEMENTS

A great number of rights have been recognised by the courts as valid easements. A selection includes the right to tunnel under land, to maintain power lines and towers, to discharge water onto somebody else's land, to have drainage pipes and sewers underground, to string a clothes line, to use a church pew, and, my personal favourite, to use a neighbour's washroom. The list of possible easements is by no means closed, despite some judicial pronouncements hinting at that in the early part of this century, a point established in *Re Ellenborough Park.* However, it should be noted that the numerous examples given here are all of what are termed "positive easements". That is, they involve A's right to do something on B's land. But there are also a few negative easements recognised - easements which give A the right to prevent B doing something with his or her land. Those known to the law are the right to light, the right to air by a defined channel, the right to lateral support for buildings, the right to continue to receive the flow of water from an artificial stream.

Note that the support right mentioned is a right specifically excluded from the list of "natural rights" which come with the fee simple. Included within the category of "natural rights" are the right to subjacent support for land and buildings, and the right to lateral support of land. Thus while some support rights are "natural", others must be "acquired".

Phipps v. *Pears* involves a claim for a negative easement - an easement of protection from the weather. Do not concern yourself at this stage with how any easement might have been created. Consider the arguments for and against permitting this and other negative easements. What values animate the judiciary in this instance?

C) CREATION BY EXPRESS OR IMPLIED GRANT

EXPRESS GRANTS AND RESERVATIONS

The common law maintains that all easements "lie in grant"; that is, they must be created by one person with an interest in land granting the right to another. (This will usually involve fee simple owners but it need not do so). The grant of the easement may be separate from the grant of an estate or joined with it. Obviously there was a grant in the *Ellenborough Park* case, the original owner of the land granting to each purchaser of a house the right to use the pleasure grounds.

At this stage we need to introduce the distinction between express grants and express reservations. Consider again the example used in the introductory note to this chapter of a person's wish to sell off part of a piece of land surrounded on three sides by woods and on one side by a road. The land will be divided into two with one part "landlocked". If the seller parts with the landlocked part and gives the buyer an easement, he or she grants both an estate and an easement. This is called an express grant of an easement. However, if the seller wants to keep the landlocked part and to sell off the part that fronts the road, and in doing so makes an agreement that he or she can have access to the road over the buyer's land, he or she has reserved the easement in the grant. The seller has kept something back. This is called an express reservation of an easement, although note that it is still being created in a grant.

There will obviously be no problem in arguing that an easement has been created, whether by express grant or express reservation, if the words in the grant are clear. If the words are less than clear, however, the deed will be construed in favour of the grantee (this is a general rule). Thus in a doubtful case it will be much easier to argue for the existence of an express grant than for an express reservation.

If you think that the word "grant" is being used here both as a verb (the process of giving) and as a noun (the transaction) you are correct. This is potentially confusing though it need not be; one can either expressly grant an easement in a grant or expressly reserve the easement in a grant.

Express grants and reservations are easy to understand, and we will do no more on them. It should be noted, however, that as it involves an interest in land the grant of an easement (by grant or reservation) must conform to the rules of the jurisdiction regarding the transfer of interests in land.

IMPLIED GRANTS AND RESERVATIONS

It was stated above that "all easements lie in grant" at common law. In reality this is a fiction, for the law permits the creation of implied easements and prescriptive easements (easements

established by long use). The fiction is maintained by calling these respectively easements obtained by implied grant and easements obtained by presumed grant. Presumed grants are dealt with in section (d) below.

Implied grants and reservations represent situations in which the law implies into a land transaction which is silent on the subject an agreement to also create an easement. As with express grants, the rules are different as between implied grants and implied reservations. Mendes da Costa and Balfour, *Property Law: Cases, Texts and Materials,* does a good job of laying out the general principles:

The situation in which easements are most commonly created by implication occurs when there is a severance of a possessory interest in land into two or more interests. This can happen, for example, when the owner of two lots sells one of them, when a homeowner leases one floor of his house to a tenant, or when a testator provides by will for the division of his real property for two or more devisees. In such cases, easements appurtenant to any of the several parts of the land may of course be created expressly. But if they are not, when do easements arise by implication?...

The leading case on many aspects of the question, regularly quoted and followed by English and Canadian courts, is Wheeldon v. Burrows (1879) 12 Ch.D. 31 (CA); it is the best introduction to the modern law. In Wheeldon, Tetley owned a piece of vacant land and an adjoining industrial property on which had been built a factory and several workshops. In January 1876, he conveyed one lot of the vacant land to the plaintiff's husband and shortly thereafter sold the industrial land to the defendant. Although the deed to the plaintiff's husband had not expressly reserved any right over the land for the benefit of Tetley's other property, the defendant claimed, as Tetley's successor, an implied easement of light which prevented the plaintiff (who succeeded to her husband's property at his death) from constructing any buildings which interfered with the flow of light to the windows of one of his workshops. When the defendant acted on that claim by knocking down a fence which the plaintiff had erected, she brought an action in trespass, seeking an injunction. At trial, the Vice Chancellor found that no such easement had been reserved by Tetley when he conveyed the land to the plaintiff's husband and accordingly the plaintiff prevailed. The defendant appealed.

In dismissing the appeal, Thesiger L.J. took the opportunity to review comprehensively the case law on the question of implied easements. His conclusion has become the leading statement of general principles:

"We have had a considerable number of cases cited to us, and out of them I think that two propositions may be stated as what I may call the general rules governing cases of this kind. The first of these rules is, that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean quasi-easements), [1] or, in other words, all those easements which are necessary to the reasonable

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[1] A quasi-easement is a right which would be an easement but for the fact that the dominant and servient tenements are owned by the same person. Example: if X owns two adjoining lots, Blackacre and Whiteacre, and uses a path over the former to get to the latter, he or she has a quasi-easement of

enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted.

The second proposition is that, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. Those are the general rules governing cases of this kind, but the second of those rules is subject to certain exceptions. One of those exceptions is the well-known exception which attaches to cases of what are called ways of necessity; and I do not dispute for a moment that there may be, and probably are, certain other exceptions, to which I shall refer before I close my observations upon this case.

Both of the general rules which I have mentioned are founded upon a maxim which is as well established by authority as it is consonant to reason and common sense, viz., that a grantor shall not derogate from his grant. It has been argued before us that there is no distinction between what has been called an implied grant and what is attempted to be established under the name of an implied reservation; and that such a distinction between the implied grant and the implied reservation is a mere modern invention, and one which runs contrary, not only to the general practice upon which land has been bought and sold for a considerable time, but also to authorities which are said to be clear and distinct upon the matter. So far, however, from that distinction being one which was laid down for the first time by and which is to be attributed to Lord Westbury in Suffield v. Brown ... it appears to me that it has existed almost as far back as we can trace the law upon the subject."

The authorities, Thesiger L.J. went on to say, are to the effect that an implied grant must be distinguished from an implied reservation: as a result of the principle that "a man cannot derogate from his own grant ... as a general rule no implication can be made of a reservation of an easement to the grantor, although there may be an implication of a grant to the grantee". Later he said: "in the case of a grant you may imply a grant of such continuous and apparent easements or such easements as are necessary to the reasonable enjoyment of the property conveyed and have in fact been enjoyed during the unity of ownership, but that, with the exception which I have referred to of easements of necessity, you cannot imply a similar reservation in favour of the grantor of land".

EXCEPTIONS TO THE GENERAL RULES

In the passage quoted above Thesiger L.J. referred to exceptions to the general rules, and cited one - "ways of necessity". The others are discussed below. "Ways of necessity" are rights of way to land that would otherwise be landlocked. Because of the fiction that all easements are created in a grant, the traditional position of the common law was that even an access right to otherwise landlocked land was the product of the intention of the parties, not a result of some public policy, even though in the vast majority of cases courts have professed to find such an intention. You can see the application of this doctrine in the *Wilkes* v. *Greenway* case, discussed above in the chapter on adverse possession. The successful adverse possessor did not gain an easement because there was clearly no intention among the parties that he do so. Some commentators and judges have suggested that public policy (presumably a policy of utilisation of land by the owner) ought to require an easement of necessity in such circumstances, but this position was rejected by the English Court of Appeal in *Nickerson* v. *Barraclough* [1981] 1 Ch. 246 (C.A.), a case in which the normal implication of intention was specifically negatived by a clause in the conveyance.

In Ontario the *Road Access Act*, R.S.O. 1990, c. R-34 effectively provides a statutory easement of necessity. Sections 2 and 3 of the Act provide:

2. (1) No person shall construct, place or maintain a barrier or other obstacle over an access road, not being a common road, that, as a result, prevents all road access to one or more parcels of land or to boat docking facilities therefor, not owned by that person unless

(a) that person has made application to a judge for an order closing the road ...;

(b) the closure is made in accordance with an agreement with the owners of the land affected thereby;

(c) the closure is of a temporary nature for the purposes of repair or maintenance of the road; or

(d) the closure is made for a single period of no greater than twenty-four hours in a year for the purpose of preventing the acquisition of prescriptive rights.

2. (2) No person shall construct, place or maintain a barrier or other obstacle over a common road that as a result prevents the use of the road unless

(a) that person has made application to a judge for an order closing the road ...;

(b) the closure is of a temporary nature for the purposes of repair or maintenance of the road.

3. The judge may grant the closing order upon being satisfied that the closure of the road is reasonably necessary to prevent substantial damage or injury to the interests of the applicant or is reasonably necessary for some purpose in the public interest and the judge may impose such terms and conditions

as the judge considers are reasonable and just under the circumstances, including a requirement that a suitable alternate road be provided.

In reviewing the material below on the other three exceptions, you should note that judges and writers on the subject may organise them differently than is done here, but the substance of what they say is the same.

The second exception is that of mutual easements. An obvious example is one of support enjoyed by two houses built touching each other. Another example is discussed in Balfour and Mendes da Costa, *Property Law: Cases Texts and Materials:*

Thesiger L.J. further considered the question of whether there were other exceptions to the principle against implied reservation and discussed, in this connection, Pyer v. Carter (1857), 156 E.R. 1472 (Exch.) and Richards v. Rose (1853) 156 E.R. 93. In disapproving Pyer for denying any distinction between implied reservation and implied grant, Thesiger L.J. had summarized the facts of the case as follows:

"A house was conveyed to the Defendant by a person who was the owner of that house, and also of the house which was subsequently conveyed to the Plaintiff; and there had been during the unity of the ownership the enjoyment of the easement of a spout which extended from the Defendant's premises over the Plaintiff's premises, and by which water was conveyed on to the latter. But it is material to observe that the water when it came on to what were subsequently the Plaintiff's premises was conveyed into a drain on the Plaintiff's premises, which drain passed through the Defendant's premises, and in that way went out into the common sewer. Subsequently the house over which this easement existed was conveyed to the Plaintiff, and upon an obstruction of the drains in the Defendant's house, which, be it observed, immediately caused a flooding of the Plaintiff's house by the very water coming from the Defendant's house, the Plaintiff brought his action, and it was held there that the Plaintiff was entitled to maintain his action, and that upon the original conveyance to the Defendant there was a reservation to the grantor of the right to carry away this water which came from the Defendant's premises by the medium of the drain which also went through his premises".

He then said of Pyer:

"I cannot see that there is anything unreasonable in supposing that in such a case, where the Defendant under his grant is to take this easement, which had been enjoyed during the unity of ownership, of pouring his water upon the grantor's land, he should also be held to take it subject to the reciprocal and mutual easement by which that very same water was carried into the drain on that land and then back through the land of the person from whose land the water came. It seems to me to be consistent with reason and common sense that these reciprocal easements should be implied."

The third exception is provided by situations in which it is necessary to imply the reservation of an easement in order to permit a grantor to fulfill his or her obligations to a grantee in a simultaneous sale of two pieces of land. Again, Balfour and Mendes da Costa's discussion of

Wheeldon deals with this exception:

Thesiger L.J. also alluded - although it was not raised by the facts of the case - to the question of easements implied in the case of simultaneous grants where the grantor, instead of severing part of his land and retaining the rest, conveys all his land to two or more grantees at one time. He referred to Swansborough v. Coventry (1832), 131 E.R. 629:

"That was a case of a sale by auction of different lots to different persons at the same time, and it was argued (and I particularly direct attention to this) that such a case must stand upon exactly the same footing as if the land in respect of which the easement was claimed had been conveyed first; consequently the case would be one in which a grant of the easement would be implied. Now observe what that admits, and the argument so dealt with upon that footing. It admits that priority in time of the conveyance was a material point for consideration, because, if it had not been admitted, then the Court might have gone to the general question, not whether the conveyances were at the same time, not whether one preceded the other by a few minutes, or a few days, or by a few years, but whether upon the severance of the property there was this (if I may use the expression) continuous and apparent easement in respect of which a reservation might be claimed, or an implication of a grant might be made. Lord Chief Justice Tindal deals with the matter, as it appears to me, upon the supposition that the general maxim is that a man who conveys property cannot derogate from his grant by reserving to himself impliedly any continuous apparent easements; he says 'It is well established by the decided cases that where the same person possesses a house, having the actual use and enjoyment of certain lights, and also possesses the adjoining land and sells the house to another person, although the lights be new he cannot, nor can any one who claims under him, build upon the adjoining land so as to obstruct or interrupt the enjoyment of those lights. The principle is ...that no man shall derogate from his own grant.... And in the present case, the sales to the Plaintiff and the Defendant being sales by the same vendor and taking place at one and the same time, we think the rights of the parties are brought within the application of this general rule of law'".

The final exception is much more general. It is contained in the quotation from *Pwllbach Colliery Company* v. *Woodman* cited in *Sandom* v. *Webb* below: "The law will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in and for which the land granted or some land retained by the grantor is to be used".

The three cases below deal with various aspects of the implied grant and reservation rules and exceptions. *Wong* involves an implied grant, and you should ask yourself whether this is a case falling under the general rule on implication or under the necessity exception or under the fourth exception. *Sandom* v. Webb and *Barton* v. *Raine* concern implied reservations, and in particular the operation of the fourth exception delineated above.

PROBLEMS

1) A owned a large lot, and sold an undeveloped part of it to B, knowing that B intended to establish a camping and trailer park on it. Unknown to A was the fact that an underground sewer went across her land from what was now B's land. B also did not know of this at the time that he bought the land. A later developed her land in a way that interfered with the underground sewer, and B sued, alleging that he had an easement to use the sewer.

Can B claim the easement by way of implied grant? Under which branch or branches of the implied grant rules might he do so?

2) The following is part of the principal question from a 1994 final exam. How would you deal with the easement issues?

In 1985 the residents of Smalltown, Ontario, were delighted to hear that Arthur Bellamy, a major player in the American electronics industry, had decided to locate a manufacturing plant in Smalltown, to be operated by his principal company, AB Enterprises. In June of that year he visited Smalltown and chose a site for the factory. That site was a piece of waste ground just outside the town and close to the main highway to Toronto, which ran in an east-west direction. The owners of the land were two sisters Catherine and Charlotte Delaney, but Charlotte lived in Toronto and had long ago told her sister she could do what she wanted with it. The land was rectangular in shape, fronting the road for about 400 metres and running directly back in a northwards direction for about a kilometre. Although it was just one parcel, it was physically comprised of two different kinds of land. The area closest to the road was a disused gravel pit. The more northerly part was cleared waste land with a stream running through its north-eastern corner. A partly-paved side road ran directly back from the main road along the eastern edge of, although wholly within, the Delaneys' parcel. This side road stopped at the stream. There was another way to reach the northern part of the land, via a dirt road which ran back from the land in a northerly direction for five miles before it reached a country road.

During his visit Bellamy negotiated with Catherine Delaney for a lease of the waste land. The two got on well, with Bellamy even joining Delaney and her family for a swim in the stream one afternoon - a favourite activity of the Delaney family. They reached the stream, of course, by driving along the side road. In August 1985 a 15-year lease was concluded for the waste land part of the Delaneys' land....

Construction of the new electronics factory started almost immediately, and was completed by mid-summer of 1986. All vehicles involved in the construction used the side road to reach the leased land, and Bellamy made some improvements in the surface of that road to make access easier. In addition, and without asking Delaney for permission, he dug trenches across the Delaneys' retained land and installed pipes to link up with the town's water and sewage system. This was required by the terms of his official permits to build and operate the factory....

Bellamy's venture was successful. Unfortunately after a few years problems arose in his relationship with Delaney. The principal cause of these was that an upturn in the gravel market led Delaney to start working the gravel pits on her land. This created a great deal of dust, which while it did not stop production did interfere with some of the delicate machinery and caused Bellamy extra expense in putting in screens and upgrading his air-cleaning systems. He remonstrated with Delaney, saying that he would not have leased the land had he known that there would be a gravel pit operating next door and that Delaney was breaching the covenant not to unreasonably interfere, and other covenants. Delaney carried on after getting advice from her lawyers that she had done nothing wrong, and Bellamy finally told her in the late summer of 1993 that he was going to sue. He filed a suit a few days later. Delaney was furious at this, and retaliated by blocking off the side road to all vehicles trying to get to Bellamy's land. Those vehicles now had to take a long detour to get to the dirt road.

In turn, Bellamy put up "No Trespassing" signs on the part of the stream still used by the Delaney family for swimming, and ordered them to leave when next they came for a swim. Bellamy also immediately filed another suit arguing that he had a right to use the road. Delaney was furious. She dug up the part of the water pipeline nearest the road thereby cutting off the water supply, and also went to court, arguing that she had a right to use the stream for swimming. Bellamy also put in a statement of claim, to the effect that he also had a right to run the pipes under Delaney's land.

D) CREATION BY PRESUMED GRANT

This section examines the third of the three ways by which easements can be created - by "presumed" grant. This is also known as creating easements by prescription. Although the crucial factor is long use the fiction of creation by grant in a transaction between parties is retained in English law through the notion that the grant of an easement either preceded "legal memory" (pre-1189) or was made in modern times (post-1189) but had been lost. The first of these types of presumed grant has never been available in the Canadian common law of real property. The second was once available but in both Canada and England legislation, initially introduced to simplify and standardise the rules on "lost modern grants", now governs the vast majority of claims. These legislative provisions, initially contained in the English *Prescription Act* of 1832, are now contained in Ontario's *Real Property Limitations Act.* For the purposes of this course you need only concern yourself with prescriptive easements arising under the *Act.*

Prescription is not like adverse possession, despite the fact that the *Real Property Limitations Act* and the notion of long use are common to both. Prescription applies only to non-possessory rights and requires lesser acts than possessory title does, and it is not even formally cast as a defence. There are other significant differences also, as outlined in the legislative provisions reproduced below and in the extract from Mendes da Costa and Balfour which follow them. The relevant sections of the Act are:

31) No claim that may be made lawfully at the common law, by custom, prescription or grant, to any way or other easement, or to any water course, or the use of any water to be enjoyed, or derived upon, over or from any land or water of the Crown or being the property of any person, when the way or other matter as herein last before-mentioned has been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years shall be defeated or destroyed by showing only that the way or other matter was first enjoyed at any time prior to the period of twenty years, but, nevertheless the claim may be defeated in any other way by which it is now liable to be defeated, and where the way or other matter as herein last before-mentioned has been so enjoyed for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it appears that it was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

32) Each of the respective periods of years mentioned in sections 30 and 31 shall be deemed and taken to be the period next before some action wherein the claim or matter to which such period relates was or is brought into question, and no act or other matter shall be deemed an interruption within the meaning of those sections unless the same has been submitted to or acquiesced in for one year after the person interrupted has had notice thereon and of the person making or authorizing the same to be made.

33) No person shall acquire a right by prescription to the access and use of light or to the access and use of air to or for any dwelling-house, work-shop or other building, but this section does not apply to any such right acquired by twenty years use before the 5th day of March 1880.

35) No easement in respect of wires or cables attached to property or buildings or passing through or carried over such property or buildings shall be deemed to have been acquired or shall hereafter be acquired by prescription or otherwise than by grant from the owner of the property or buildings.

These sections should be read in conjunction with the following commentary by Mendes da Costa and Balfour, *Property Law: Cases, Texts and Materials*

Under these provisions, the following are the points of significance:

1) Section 31 establishes two different periods for the creation of prescriptive easements. These periods are twenty and forty years.... After twenty years of adverse use, an easement cannot be defeated by showing that user began after 1189. This merely facilitates the operation of prescription at common law by eliminating one kind of defense. Thus, while an easement by prescription at common law could not be created in Ontario apart from this provision, section 31 makes "time immemorial" irrelevant and enables a prescriptive easement to be created at common law in this province. Apart from showing user began after 1189, a claim for a prescriptive easement after twenty years' adverse use may still be defeated by any other defence that was available at common law.... After forty years of adverse use, the easement becomes "absolute and indefeasible". This is not as definite as it appears. The basic rule that prescription must operate for and against a fee simple estate still applies. Thus, a tenant cannot prescribe against his landlord .... Also a claim based on forty years' adverse use may be defeated, as could a twenty year claim, by showing that the user was forcible or secret, or enjoyed by written permission. On the other hand, a forty year claim cannot be defeated, as a twenty year claim can, by proving it was enjoyed by oral permission....

2) Section 32 only comes into play when there is litigation and the relevant period of user must immediately precede the bringing of the action. Thus, forty years of adverse use does not of itself create an "absolute" prescriptive easement. An action must be brought and the necessary period of enjoyment must be immediately prior to the commencement of that action.

3) The period must be "without interruption". This does not mean mere nonuser by the person claiming the easement. It means that the claimant has not been obstructed from enjoying the use.

4) No act is deemed to be an interruption for the purpose of section 32 unless the person claiming the easement has submitted to interruption for one year.

Example of the operation of sections 31 and 32 X has been crossing Y's property as if he had an easement for 19 years and one day. The next day Y prevents X from crossing by placing an obstruction in the way of passage. At this time, X has no right to cross as he cannot show twenty years of enjoyment. However, if X sues for a prescriptive easement one year from the day after he had enjoyed the use for nineteen years, he will succeed. X will now be able to show twenty years of enjoyment prior to bringing the action. The interruption will not count as it was for one year less a day. X could not have brought his action sooner as he would have been short of the twenty year period required. An action brought by X on the following day will be too late as the interruption will now have lasted a year and section 31 can no longer apply....

The law relating to prescription is both confusing and complex. Confusion and difficulties under the present law arise from:.....

- having two different periods under the statute when one would be sufficient
- tying the prescription periods under the statute to the commencement of an action;

- requiring long periods of adverse enjoyment, considering that ten years' adverse possession is sufficient to create a possessory title;
- the poor drafting of the statutory provisions....
- the obscureness of the law as to the meaning of "user as of right"; and
- the difficulty or undesirability, in some cases, of having to make "interruptions" in the running of time by the creation of physical obstructions.

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USER AS OF RIGHT

Merely establishing that the right has been exercised for the correct period of time is not enough to make out a claim for a prescriptive easement. The common law rules on the nature and quality of use also have to be adhered to. These were developed in the context of "lost modern grant" claims, but have always been used for statutory prescription also. It might be useful to think of these as laying down requirements for the quality of use of an alleged easement in the same way that the courts developed rules for the quality of possession in adverse possession law.

The principal rules are twofold. First, the use must be continuous. This does not mean that the claimant must have used the alleged easement every day. Continuity is judged according to the nature of the right being asserted - see the discussion of *Axler* v. *Chisholm* below.

Second, the claimant of the easement has to have exercised "user as of right". This means that the claimant has to have exercised the alleged right in such a way that he or she can be seen as having said: "Of course I have a right to do this". Conversely, the servient tenement owner can be said to have acquiesced in the use by right. This requirement of "user as of right" is said to consist of three sub-rules, summarised in the Latin maxim *nec clam, nec vi, nec precario* - no secrecy, no violence, no permission.

"No Violence" requires the claimant to have used the easement without brushing aside significant protest by the owner. Note, however, that similar acts can represent both an assertion of a right and use not by right but by violence. Take the case of a right of way which the servient tenement owner blocks off. If the dominant tenement owner removes the obstruction the court may well find that he or she is saying: "I am removing the obstruction because it is my right to use this path and you have no right to block it". If the servient tenement owner does nothing further, the court might also say that he or she has acquiesced to this assertion of a right. But if another obstruction is placed in the way, and again removed, we get much closer to non-acquiescence and a violation of the "no violence" rule. Thus whether an action constitutes "user as of right" or user by violence can depend on all the circumstances.

"No secrecy" means that the easement must be used openly so that the servient tenement

owner knows about it and acquiesces. When dealing with the "no secrecy" requirement courts use phrases such as openly, notoriously, without stealth, etc. This is a good statement of the principle: "the rights alleged may only be claimed if the benefit was enjoyed as of right, in an open and notorious manner sufficient to convey to the mind of the servient owner the fact that a claim was being asserted which, if it was acquiesced in, would ultimately ripen into a right". Thus again acquiescence is at the root of prescription.

A case on secrecy is *Axler* v. *Chisholm* (1977), 79 D.L.R. (3d) 97 (Ont. H.C.). The plaintiff argued that she was entitled to a prescriptive easement over a part of the defendant's lake front lot for the purpose of storing a portable dock. The plaintiff had stored her portable dock on the defendant's land from October to May every year between 1945 and 1969, at which point the defendant objected. The evidence showed that until 1952 the owner of the servient tenement only visited it twice a year during the summer; it was otherwise undeveloped and unoccupied. In 1952 the lot was sold, and the new owner probably came to know about the storage of the portable dock and permitted it. In 1968 the property was again sold, to Chisholm, who, the following year, objected to having the dock stored on his land. Craig J. held, inter alia, that no prescriptive easement had been established. The necessary 20-year prescription period ran from 1950 until the plaintiff began her action in 1970. And on the facts there had not been 20 years of continuous "user as of right". The fact that the use was seasonal and intermittent did not of itself prevent it from being continuous, for continuous means different things in different circumstances. But the intermittent nature of the use meant that in the circumstances it was "clam". The "no secrecy" requirement meant that the servient tenement owner must have had knowledge, actual or constructive (the means of knowledge), of use of the easement, and the onus of proving such knowledge rested with the plaintiff. In this case the plaintiff was unable to show that the owner between 1950 and 1952 had such knowledge, since the dock was stored on the land in wintertime and the owners only visited the lot in summer. Craig J stated: "it should not be held that an owner of a vacant summer cottage lot has an obligation to inspect his or her boundaries of the lot at certain seasons of the year; or that failure to do so would be to risk loss of property rights".

The issue of permission is dealt with in *Garfinkel* v. *Kleinberg*, below. As you read it pay special attention to the difference between acquiescence by the servient tenement owner and permission from that person.

E) THE SCOPE OF EASEMENTS AND TERMINATION

Scope. An easement granted for one purpose cannot be used for another. See *Malden Farms Ltd.* v. *Nicholson* (1956), 3 D.L.R. (2d) 236 (Ont. C.A.). In 1916 the owner of the servient tenement granted the owner of the dominant tenement (which was farmland) a right of way across his land for persons, animals and vehicles. In the early 1950's the successor in title to the dominant tenement began to develop the land as a beach resort, and the right of way was used by increasingly large numbers of vehicles. The Court of Appeal sustained an injunction granted to the successor in title to the original owner of the servient tenement. Aylesworth J.A. noted that the applicable principles were to be found in *Gale on Easements*:

> According to the present state of the authorities, it appears that the grantee of a right of way is not entitled to increase the legitimate burden. But, on the other hand, the legal extent of his right may entitle him to increase the amount of inconveniences imposed upon the servient tenement - e.g., by placing on the dominant tenement new buildings or increasing the size of old buildings. And the legal extent of the right (in other words, the mode as distinct from the extent of user) must, it seems, be ascertained from the intention of the parties at the time when the right was created.

He then held that "the burden of the easement has been markedly increased.... [It] is now burdened, not with a private right of way in favour of appellant, his heirs and assigns, as originally contemplated, but with a use of the way for appellant's commercial purposes by great numbers of the public who travel over respondent's lands much as though the same constituted a public highway or a busy toll-road." Thus the appellant's use of the right of way was an "unauthorized enlargement and alteration in the character, nature and extent of the easement."

See also *Re Gordon et al and Regan et al* (1985), 15 D.L.R. (4th) 651 (Ont. H.C.). The parties were each entitled to a right of way over a mutual private drive to reach their respective lots. In 1922 the predecessors in title to one of the parties had bought some adjoining land and built a garage on it and then used the drive to reach that land also, which practice was continued by the party in this action. But he now wanted to convert the house into two semi-detached houses and to allow the purchasers of the second house to use the right of way to get to the adjoining land and garage. Griffiths J. held first that a right of way remains attached to each part of a dominant tenement if it is sub-divided and that, absent any specific restrictions in the grant, a reasonable increase in use is permissible. He then held that the proposed use was improper because a right of way appurtenant to one lot cannot be used colourably to reach a different, adjoining lot.

Termination. There are a number of ways to extinguish an easement. First, by statutory provisions allowing an application to the court for an order terminating the easement. While these are common with respect to restrictive covenants (see chapter seven below), few common law jurisdictions have such legislation for easements. In Canada only British Columbia does: *Property Law Act*, R.S.B.C. 1979, c. 340, s. 31 (2).

Second, an easement is terminated by operation of law if the purpose for which it is granted comes to an end, or if the right is abused (as in the *Malden Farms* case noted above), or if it was granted with a time limit and the time expires, or if the owner of the dominant and servient tenement becomes the same person. Note, however, with respect to this last point that if the same person comes into possession of the two tenements under different estates, the easement will merely be suspended.

Third, an easement can be terminated by release, express or implied. The burden of proof is very high on the owner of a servient tenement who wants to argue implied release; merely showing that the use was stopped for some period of time will not suffice. The stoppage must amount to an abandonment of the easement. In Barton v. Raine, above, Thorson J.A. dealt thus with an argument that the easement that a period of non-use had terminated the easement: "the interruption in its use which occurred following the father's stroke did not impair that easement, which, once acquired, could only be lost by non-user on evidence clearly establishing an intention to abandon it. As pointed out by the trial Judge, the circumstances of the non-user in this case were not consistent in any way with an intention to abandon the right."

NOTES:

(taken from Jim Phillips, *Property Casebook 2008-2009*)

1) Although it was not necessary to do so, Lederman J. went on to discuss whether a right of publicity/ right of action for appropriation of personality survived the death of the subject; that is, whether it descended to heirs. He held that it did, noting, inter alia, that "[t]he right of publicity ... protects the commercial value of a person's celebrity status. As such, it is a form of intangible property, akin to copyright or patent, that is descendible.... The right of publicity, being a form of intangible property ..., should descend to the celebrity's heirs. Reputation and fame can be a capital asset that one nurtures and may choose to exploit and it may have a value much greater than any tangible property. There is no reason why such an asset should not be devisable to heirs."

Lederman J. also dismissed the estate's second claim, that it held copyright in the conversations with Carroll. He stated that "for copyright to subsist in a work, it must be expressed in material form and have a more or less permanent endurance" and that "a person's oral statements in a speech, interview or conversation are not recognized in that form as literary creations and do not attract copyright protection".

An appeal to the Court of Appeal in Gould Estate was dismissed (unreported judgment, 1998, QL [1998] O.J. no 1894), but on the basis that Carroll owned copyright in the photographs, captions and text which appeared in the book.

2) The consequences of recognizing the same kind of personality right as the courts in the United States have been criticized in M.A. Flagg, "Star Crazy: Keeping the Right of Publicity Out of Canadian Law" (1999) 13 Intellectual Property Journal. There it is argued that the law favours "the rights of successful and well-known individuals over the rights of the public to depict, use, parody or honour many of the cultural icons of our time". Flagg suggests that the parameters of any publicity right should be legislated, because legislation would consider both the rights of creators with those of users and with Charter of Rights values such as freedom of expression and equality.

3) As may be inferred from Gould Estate, the common law does not generally recognise what we might call a 'right of privacy' in our personalities. There are exceptions, including section 5 of the Quebec Charter of Human Rights and Freedoms, which reads: "Every person has a right to respect for his private life". That section was applied in Aubry v. Editions Vice-Versa Inc [1998] 1 S.C.R. 591 Pascale Aubry brought an action against a photographer and a magazine for taking and publishing, without her consent, a picture of her sitting on the step of a building in downtown Montreal. The Supreme Court of Canada held that this was an infringement of the plaintiff's right to privacy under the Quebec Charter. The majority judgment of L'Heureux-Dube and Bastarache JJ. stated: "that right must include the ability to control the use made of one's image, since the right to one's image is based on the idea of individual autonomy". The right to privacy needed

to be balanced against "[t]the public's right to information" and against another person's right to freedom of expression. Thus there were circumstances in which a person lost control of the right to determine when his or her image was used; one obvious example was that of a public figure acting in the public domain, another was that of someone photographed as part of a crowd scene but who was not the subject of the photograph. But in this case those considerations did not apply, and the publishers were liable even in the absence of any defamation or other prejudice.

4) Some common law provinces have privacy Acts, which provide some protection. That of British Columbia (Privacy Act, R. S.B.C. 1996, c. 373) makes it a tort to "violate the privacy of another." It goes on to say that "The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, given due regard to the lawful interests of others." It also states, presumably in response to the problem of "papparazi" (of which I have little personal experience), that "privacy may be violated by eavesdropping or surveillance, whether or not accomplished by trespass."

In a different section the BC Act codifies common law publicity rights, stating: "It is a tort, actionable without proof of damage, for a person to use the name or portrait of another for the purpose of advertising or promoting the sale of ... property or services, unless that other ... consents to the use for that purpose." In Poirier v. Wal-Mart Canada Corp, [2006] Carswell BC 1876 (B.C.S.C.) the plaintiff was a store manager for Wal-mart who did consent to his name and photograph, accompanied by a welcoming message, to be used for the opening of a new Wal-mart store which he was going to be the manager of. But shortly thereafter he was dismissed for unacceptable accounting practices. Five weeks after his dismissal an extensive advertising campaign was run featuring him. The trial judge held that the dismissal "must surely be interpreted to cancel the consent previously provided." He distinguished a number of other cases, including Krouse, principally on the ground that in them the individual was not recognisable. Poirier was awarded $15,000 in compensation.